C.A.R. MLS Policy Committee
MLS Mandatory Submission Rule - Work Group Recommendations

This Issues Briefing Paper is for Study only and has not been approved by the MLS Policy Committee, Executive Committee, or the Board of Directors.

WORK GROUP MEMBERS:

Wes Burk - Scenic Coast AOR
Pam Winterbauer – Bay East AOR
Ken Neufeld – Fresno AOR
John Schulte - The Inland Gateway AOR
Robert Dadurka – San Francisco AOR
Michael Tessaro – Bay East AOR
Bryan Robertson – Silicon Valley AOR
Ron Johnson - Paso Robles AOR
Kathryn Kelly - South Bay AOR
Jean Powers - Bay East AOR
Wendy Furth - Southland Regional AOR
Bruce Engles – Citrus Valley AOR

C.A.R. STAFF MEMBER:

Elizabeth Miller-Bougdanos, Senior Counsel, MLS Policy Committee Coordinator

INTRODUCTION:

The mandatory MLS requirement to submit listings to the Service can be the source of several questions and concerns. First, there are ambiguities that periodically arise in the interpretation of an MLS's Mandatory Submission Rule. Second of all, in the current market, there are many complaints about agents undercutting cooperation (ex: off-MLS listings/seller exclusions, delayed showings) and maneuvering around the Mandatory Submission Rule, often, it is believed, without the seller's awareness of his or her lost marketing opportunities and the potential resulting impact on price.

In light of these tribulations, the MLS Committee's Work Group convened to examine the Mandatory Submission Rule, as well as other related MLS Rules – in particular the Exempted Listing Rule – with an eye toward making MLS Rules clearer and more uniform in application as well as elevating practice overall by tightening them up to reduce troubling practices.

With this as its charge, the Work Group considered several ways to better address these issues and now presents its recommendations for revising the C.A.R. Model MLS Rules to the MLS Policy Committee for its consideration.

DISCUSSION:

1. The Mandatory Submission Rule

The current C.A.R. Model MLS Mandatory Submission Rule is as follows:

> ***7.5 Mandatory Submission.*** *Broker Participants shall input exclusive right to sell or exclusive agency listings on one to four unit residential property and vacant lots located within the service area of the MLS within 2 days after all necessary signatures of the seller(s) have been obtained on the listing or at the start date of the listing, whichever is later. Only those listings that are within the service area of the MLS must be input. Open listings or listings of property located outside the MLS's service area (see section 7.7) are not required by the service, but may be input at the Broker Participant's option.*

The portion of the rule highlighted above ("*within 2 days after all necessary signatures of the seller(s) have been obtained on the listing or at the start date of the listing, whichever is later*") presents questions about (1) what are the requisite "necessary signatures" triggering entitlement and obligation to submit a listing, and (2) what is the "start date" of a listing. Answering the first question is more of a legal matter while answering the second one is a more philosophical matter. The second one also intersects with other "hot" issues of the moment such as delayed or no MLS submission, delayed showings and proper designation of statuses.

(A) Necessary Signatures

When does a listing have "*all necessary signatures of the seller,*" triggering entitlement and obligation to submit a listing to the MLS? The necessary signature question often arises in the context of divorce. Perhaps only one spouse has entered into a listing agreement. The property is still jointly owned, but a listing agreement has been entered into between only one of the feuding spouses and listing agent. Can/must the listing be submitted?

There are undoubtedly many legal and other concerns which exist in selling a property where there are known additional property owners who are not signatories of the listing (marketability, disclosure, potential fraud, etc). Depending on the circumstances, these factors may even restrict or prevent closing of the sale. However, from an MLS submission perspective, "necessary signatures" means signatures that are necessary to create an enforceable listing – meaning those which, legally speaking would be sufficient to create a legally valid listing contract. To be legally enforceable, the listing contract would not necessarily have to include all owners. Essentially, the necessary

signatures would include the signatures of all named signatories on the listing agreement.

The Work Group agreed that the mandatory submission rule should be clarified to state that necessary signatures connotes signatures that are necessary to create an enforceable listing, but that the rule should also require an additional disclosure in the event there are known additional property owners not on the listing. If there are known additional property owners not on the listing, the listing must indicate whether the seller will sell contingent on the consent of those additional property owners (or is obtaining court order to sell, etc).

(B) Start Date of a Listing

If a listing is required to be submitted to the MLS within 2 days after all necessary signatures of the seller, what does "*or at the start date of the listing, whichever is later*" mean? There seems to be consensus that the term *"start date of the listing*" is not something normally outlined separately in the listing contract and that it presents confusion and ambiguity in applying the MLS Rule. That being said, there would seem to be two main reasons for the rule to provide the flexibility of a delayed start date.

The first would be in anticipation of scenarios where a listing agreement has been fully signed by sellers but there has been a delay in sending it back to the listing agent (ex: sellers went on vacation and didn't send it back to agent until returning) such that MLS submission within 2 days of signing is impossible. In this case, the rule provides relief to those otherwise subject to a rule violation when a seller delays transmission of the signed contract back to listing agent.

The second reason seems to be that the seller and agent wish to postpone showings for some initial time period. The parties may wish to postpone submission to delay marketing until after sprucing up the property or getting it staged or even until after finalizing various marketing materials. However, all of these reasons can also be addressed by timely submitting the listing to the Service, but placing it in a "Hold" status. The C.A.R. Model MLS Rules designate an Off Market "Hold" status for those listings where showings are not permitted: *"Hold (H): A valid listing contract is in effect, however, because of various reasons such as repairs, illness, guests, etc., the Seller has requested that temporarily there be no showings. This is an Off-Market status.*" When a listing is in a "Hold" status, there is no active marketing and no advertising in data aggregation feeds until showing is allowed. "Hold" would seem to be an appropriate, and more transparent, category for listings with a signed, listing agreement in place than simply quietly keeping them off the Service. If seller wishes to keep them off the MLS, there should be a signed, seller exemption submitted to the Service.

The Work Group believed that the Rule should clearly provide flexibility for delayed MLS submission to excuse late entry in instances where sellers have delayed returning the signed listing agreement to the listing agent, but otherwise agreed that the mandatory submission requirement should simply be

triggered by the date the contract is fully signed. It supports removing the "*or at the start date of the listing, whichever is later*" option.

(C) Clarifying the Duty to Timely Submit Listing or Exemption

While there is general understanding that complying with an MLS's Mandatory Submission Rule requires that the listing be timely submitted, it is not always as clear to agents that if they will not be submitting a listing, they are still required to file a signed, seller exemption on the same deadline. The Work Group agreed that the Mandatory Submission Rule should clarify this obligation.

(D) Recommendation for Clarifying the Model Mandatory Submission Rule

The Work Group recommends making all the changes outlined in the discussion above and thus the proposed, revised C.A.R. Model MLS Mandatory Submission Rule as follows:

> ***7.5 Mandatory Submission.*** *~~Broker Participants shall input exclusive right to sell or exclusive agency listings on one to four unit residential property and vacant lots located w~~Within 2 days after all necessary signatures of the seller(s) have been obtained on ~~the listing or at the start date of the listing, whichever is later~~, any exclusive right to sell or exclusive agency listing on one to four unit residential property and vacant lots located within the service area of the MLS, Broker Participants shall (1) input the listing to the service, or (2) submit a seller-signed exclusion in accordance with Section 7.6 (Exempted Listings) to the service. All necessary signatures are those needed to create an enforceable listing, which generally means all named signatories to the listing agreement. In the event there are known additional property owners not made a signatory to the listing, listing broker shall disclose said fact on the service and state whether the listed seller will sell contingent on the consent of the additional property owners. In the event listing agent is prevented from complying with the 2 day time period due to seller's delay in returning the signed listing agreement, listing broker must submit the listing to the service within 2 days of receipt back from seller. The MLS may require listing broker to present documentation to the service evidencing seller's delayed transmission. Only those listings that are within the service area of the MLS must be input. Open listings or listings of property located outside the MLS's service area (see Section 7.7) are not required by the ~~s~~ervice, but may be input at the Broker Participant's option.*

2. The Exempted Listings Rule

The current C.A.R. Model Exempted Listings Rule is as follows:

> ***7.6 Exempted Listings.*** *If the seller refuses to permit the listing to be disseminated by the service, the listing broker shall submit to the*

service a certification signed by the seller that the seller does not authorize the listing to be disseminated by the service.

In the present market, there has been an increase in various forms of "pocket" listings, delayed or no MLS submission (with or without signed-seller-exclusions). REALTORS® have expressed concern that some of these sellers are not making an informed decision to opt out of the MLS. The C.A.R. Standard Seller Exclusion form ("SEL" form) provides a broad, comprehensive advisory to sellers about the MLS and what they waive by opting out. In the SEL, an advisory alerts seller that, in keeping the listing off the MLS, "(1) real estate agents and brokers from other real estate offices, and their buyer clients, who have access to the MLS may not be aware seller's property is for sale, (2) seller's property will not be included in the MLS's download to various real estate Internet sites that are used by the public to search for property listings, and (3) real estate agents, brokers and members of the public may be unaware of the terms and conditions under which seller is marketing the property."

Many REALTORS® report, however, that some agents don't use the SEL or another form that actually educates sellers about the decreased exposure that results from opting out of the MLS. Some agents provide a stripped down office form of some sort that they have seller sign. While NAR policy prevents an AOR/MLS from compelling brokers and agents to use its forms, the requirement to provide a full and fair disclosure to sellers could be imposed on participants and subscribers <u>through the MLS Rules</u>. The Exempted Listings Rule could be "beefed up" to contain a stepped-up disclosure requirement on ALL seller exemptions, by way of the C.A.R. SEL or otherwise.

When presented with the option of revamping the Exempted Listings Rule to require that seller advisory language mirroring the SEL be required in all seller exemptions, the Work Group highly supported it.

Recommendation for Revising the Exempted Listings Rule

In light of the discussion set forth above, the Work Group recommends revising the C.A.R. Model MLS Exempted Listings Rule as follows:

> **7.6 Exempted Listings.** If the seller refuses to permit the listing to be disseminated by the service, the listing broker shall submit to the service a certification signed by the seller that the seller does not authorize the listing to be disseminated by the service. <u>C.A.R. Standard Form SEL may be used for this certification, but in any event, said exclusion shall include an advisory to seller that, in keeping the listing off the MLS, (1) real estate agents and brokers from other real estate offices, and their buyer clients, who have access to the MLS may not be aware seller's property is for sale, (2) seller's property will not be included in the MLS's download to various real estate Internet sites that are used by the public to search for property listings, and (3) real estate agents, brokers and members of the public may be unaware of the terms and conditions under which seller is marketing the property.</u>

***Exempted Listings Rule Epilogue**

Note, during the course of this Directors' Meeting, the C.A.R. Ethics and Professionalism Task Force is recommending that the Standard Forms Committee revise the Listing Agreement to include the SEL disclosures set forth above into the RLA itself – and that an additional provision be added advising of the potential adverse impact on price that could result when properties are kept off the MLS and allotted limited market exposure.

Along this line, the Work Group also favored adding a price provision to a revamped Exempted Listings Rule such as *"and (4) the reduction in exposure of the listing may lower the number of offers made on the property and may adversely impact the overall price*." The only wrinkle is how to handle a required MLS Rule disclosure that exceeds what is currently required in the C.A.R. forms? Even if the RLA and SEL are ultimately revised to add this type of language, there will be a delay before the new forms will be released. Therefore, the Work Group's recommendation is that disclosure points mirroring the SEL be adopted immediately into the C.A.R. Model MLS Rules and that an additional provision addressing the impact on price be approved now for future inclusion in the C.A.R. Model MLS Rules if and when parallel language is in place on the forms.

PROPOSED MOTION:

In light of the recommendations outlined in this Issues Briefing Paper, the Work Group recommends approval of the following motion:

That, upon final approval by NAR, the Work Group Recommendations for Revising the C.A.R. Model MLS Rules on Mandatory Submission and Exempted Listings be adopted and incorporated into the C.A.R. Model MLS Rules as set forth below and that Staff make any necessary correlating changes to the Model Citation Policy:

> **7.5 Mandatory Submission.** ~~Broker Participants shall input exclusive right to sell or exclusive agency listings on one to four unit residential property and vacant lots located w~~Within 2 days after all necessary signatures of the seller(s) have been obtained on ~~the listing or at the start date of the listing, whichever is later~~, any exclusive right to sell or exclusive agency listing on one to four unit residential property and vacant lots located within the service area of the MLS, Broker Participants shall (1) input the listing to the service, or (2) submit a seller-signed exclusion in accordance with Section 7.6 (Exempted Listings) to the service. All necessary signatures are those needed to create an enforceable listing, which generally means all named signatories to the listing agreement. In the event there are known additional property owners not made a signatory to the listing, listing broker shall disclose said fact on the service and state whether the listed seller will sell contingent on the consent of the additional property owners. In the event listing agent is prevented from complying with the 2 day time period due to seller's delay in returning the signed listing

agreement, listing broker must submit the listing to the service within 2 days of receipt back from seller. The MLS may require listing broker to present documentation to the service evidencing seller's delayed transmission. Only those listings that are within the service area of the MLS must be input. Open listings or listings of property located outside the MLS's service area (see Section 7.7) are not required by the service, but may be input at the Broker Participant's option.

7.6 Exempted Listings. If the seller refuses to permit the listing to be disseminated by the service, the listing broker shall submit to the service a certification signed by the seller that the seller does not authorize the listing to be disseminated by the service. C.A.R. Standard Form SEL may be used for this certification, but in any event, said exclusion shall include an advisory to seller that, in keeping the listing off the MLS, (1) real estate agents and brokers from other real estate offices, and their buyer clients, who have access to the MLS may not be aware seller's property is for sale, (2) seller's property will not be included in the MLS's download to various real estate Internet sites that are used by the public to search for property listings, and (3) real estate agents, brokers and members of the public may be unaware of the terms and conditions under which seller is marketing the property.

AND

That parallel language along the line of that set forth below be added to the Exempted Listing Rule if and when it goes into the C.A.R. Standard Forms:

and (4) the reduction in exposure of the listing may lower the number of offers made on the property and may adversely impact the overall price.